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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CESAR VILLEGAS et al., Defendants and Appellants.	B181548 (Los Angeles County Super. Ct. No. TA076355)

APPEALS from judgments of the Superior Court of Los Angeles County, Jack W. Morgan, Judge. Affirmed.

Mathews & Rager, Charles T. Mathews and Peter C. Beirne for Defendant and Appellant Cesar Villegas.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant Jaime Zapin Torres.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, and Russell A. Lehman, Deputy Attorney General, for Plaintiff and Respondent.

Jaime Torres and Cesar Villegas appeal from the judgments entered following a joint jury trial in which each was convicted of simple kidnapping as a lesser offense of kidnapping to commit rape, and Villegas was also convicted of forcible rape and two counts of forcible oral copulation, with further findings that the victim had been kidnapped during the commission of these offenses and that the kidnapping substantially increased the risk of harm to her. (These findings established a special circumstance providing for greater punishment under the "One Strike" law (Pen. Code, § 667.61, subd. (d)(2)).) Torres contends that the evidence was insufficient to support the verdict against him. Villegas contends that the jury was tainted during voir dire, he was prevented from appropriately examining witnesses, certain evidence was improperly admitted at trial, the prosecutor committed prejudicial misconduct, and the One Strike finding was inconsistent with the verdict. We affirm.

BACKGROUND

On the evening of May 27, 2004, teenagers Daniela M. and Daniela L. were waiting at a bus stop at Atlantic Avenue and Imperial Highway in Lynwood to catch a bus to take home to East Los Angeles when a car pulled up. Villegas and Torres, both in their 30's, were in the car. After finding out where the girls were going, defendants asked if the girls wanted a ride. Assured that nothing would happen and that they would be taken straight home, the girls accepted the offer. Villegas, who had been in the front passenger seat, got out and accompanied Daniela M. into the back seat of the car. Daniela L. got into the front seat with Torres, who was the driver.

A few minutes into the ride, defendants asked the girls if they wanted to "kick it" and eat some shrimp that defendants were going to grill. The girls declined, saying that they just wanted a ride home. As the ride continued, Villegas directed Torres to make a series of turns, which Torres did at a high rate of speed. During this time, Villegas touched Daniela M.'s breasts and leg. Torres put his hand inside Daniela L.'s pants and also grabbed her breasts. Both girls repeatedly told defendants to stop and to take them home. Defendants said they would do so and kept driving. At one point while stopped at

a red light, the girls saw a nearby police car and told defendants that they would alert the police. Defendants again promised to take the girls home. But when the light turned green, Torres told the girls that they would not be going home and accelerated, making more turns as directed by Villegas. Ultimately, Torres stopped the car on a residential street in Lynwood.

A man was standing by a truck where defendants had stopped. Villegas said the man was a friend of his, and that if the girls wanted to get money they should have sex with the man. The girls got out of the car and walked away quickly. Defendants followed them in the car. The girls went to a nearby house and knocked on the front door. Villegas got out of the car and approached the girls at that point. As Villegas did so, Daniela M. got under a truck that was parked in the driveway in an attempt to hide. Villegas demanded that the girls get into the car. Daniela L. ran away and climbed onto a fence, where she got stuck and cried out for help.

Villegas turned his attention to Daniela M. He demanded that she get out from under the truck and threatened to harm her family if she did not do so. When Daniela M. did not comply, Villegas pulled her out and took her to a grassy area near one of the houses. Fearful of Villegas, Daniela M. complied with Villegas's demands that she remove her shirt and bra. Villegas next unzipped his pants and told Daniela M. to orally copulate him. Daniela M. protested but did so. At Villegas's direction, Daniela M. next removed her pants. Villegas got on top of Daniela M. and attempted to insert himself. He was unable to do so, and told Daniela M. to orally copulate him a second time. She complied, after which Villegas was able to achieve penetration. Daniela M. cried throughout the ordeal.

As the sexual assault was in progress, police officers arrived at the scene in response to a 911 call that was placed by a neighbor who had heard Daniela L.'s cries for help. When Villegas realized that officers were there, he stopped his act of forcible intercourse, told Daniela M. not to say anything, and pulled up his pants. Villegas was asked what he was doing, and he responded that he was lying in the grass with his girlfriend. Torres was sitting in his car when the officers arrived, which was parked

nearby. Both defendants were taken into custody. Daniela M. was sobbing as she dressed herself and was transported to a hospital.

The medical examination of Daniela M. revealed genital trauma of a nature to be expected with forceful rather than consensual sexual contact. The officer who booked Villegas smelled the odor of alcohol on Villegas's breath. While being booked, Villegas spontaneously asked in a laughing manner how much time he would get. Both defendants laughed when told of Daniela M.'s claim that she had been sexually assaulted.

In defense, evidence was presented that, in giving a statement to the police, Daniela L. did not say that either defendant physically restrained her from getting out of the car. Villegas, 4 feet 11 inches tall and weighing 130 pounds, was smaller than Daniela M.

Villegas testified that he was a union electrician, had been married for eight years, and had a child. On the night of the incident, he and Torres spent the evening drinking beer and watching a Lakers' game. Afterward, they saw Daniela L. and Daniela M. waiting for a bus and decided to ask if they wanted a ride. When the girls got in, Daniela L. asked if defendants had any methamphetamine. Defendants said they did not, but invited the girls to "kick back" and go to Torres's mother's house to eat grilled shrimp. The girls said yes, and as they continued driving, Daniela M. kissed Villegas.

Villegas's testimony continued that when they arrived in front of Torres's mother's house, Daniela L. said she was not sure she should be there. Daniela L. also said if defendants gave them money, the girls would "kick" with them. Villegas was not interested and started making jokes about Daniela L.'s weight. As the ride continued Daniela L. directed Torres where to turn. At some point Daniela L. told Torres to stop, saying she knew the man who was standing by a truck. Villegas told Daniela L. that if she wanted money, she should get it from the man. Daniela L. got mad and walked away. Defendants followed the girls. Ultimately, Daniela M. told Villegas that she wanted to have sex with him. He suggested they go to the car, but she wanted to stay in the grass near the houses. They had sex, although Villegas could not get an erection at

first. Daniela M. seemed to enjoy herself. Villegas blamed his own poor judgment for agreeing to have sex with Daniela M.

DISCUSSION

1. Sufficiency of the Evidence Against Torres

Torres contends that the evidence was insufficient to support his conviction of kidnapping Daniela M. because, based on uncontradicted testimony, she and Daniela L. voluntarily got into the car with defendants, neither defendant ever physically tried to stop either girl from getting out of the car, and "there was substantial evidence that [Torres] 'entertain[ed] a reasonable and bona fide belief that [Daniela M.] voluntarily consented to accompany him,' which negated any criminal intent. (*People v. Felix* [(2001)] 92 Cal.App.4th [905,] 910; *People v. Mayberry* [(1975)] 15 Cal.3d [143,] 155.)" We disagree.

"Every person who forcibly, or by other means of instilling fear . . . takes . . . any person . . . into another part of the same county, is guilty of kidnapping." (Pen. Code, § 207, subd. (a); *People v. Mayberry*, *supra*, 15 Cal.3d at p. 153.) As stated in *People v. Galvan* (1986) 187 Cal.App.3d 1205, 1213, "[t]he Supreme Court held a conviction for violating [Penal Code] section 207 will stand 'if supported by substantial evidence that although initial entry into a vehicle was voluntary, the victim was subsequently restrained therein by means of threat or force while asportation continued.' [Citations.] The force used against the victim 'need not be physical.' [Citation.]" (Fn. omitted.)

The relevant question here is not the one posed by Torres as to whether the evidence could support a defense that Torres reasonably believed the girls had consented to accompany defendants. Rather, a conviction is supported by substantial evidence where, on review of the entire record, it is found to be reasonable, credible and of solid value. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 90; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) In making this determination, the reviewing court does not reweigh the evidence or reassess the credibility of witnesses. (*People v. Bolin* (1998) 18 Cal.4th 297, 333; *People v. Culver* (1973) 10 Cal.3d 542, 548.) Rather, "the reviewing court must consider the evidence in a light most favorable to the judgment and presume

the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) "'The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. [Citation omitted.]'" (*People v. Johnson*, *supra*, 26 Cal.3d at p. 576.)

The evidence below established that after the girls declined defendants' invitation to "kick it" and asked to be taken home, Torres drove fast and executed a series of turns. During this time, defendants made physical advances toward the girls and both girls demanded that defendants stop. And although defendants said they would take the girls home, it was clear that defendants were not doing so. Finally, after a nearby police car had left, defendants told the girls they would not be going home and refused the girls' requests to stop the car and let them out, ultimately taking the girls to an unfamiliar residential neighborhood.

"When, as here, the victim could not have extricated herself from a moving vehicle and was transported miles away from her home, asportation is sufficient to constitute kidnapping." (*People v. Galvan*, *supra*, 187 Cal.App.3d at pp. 1214–1215.) Evidence that the girls entered the car voluntarily and Villegas's testimony that the girls had offered to "kick it" with defendants for money does not alter this conclusion. Accordingly, Torres's sufficiency contention must be rejected.

2. Jury Taint During Voir Dire

During the second day of voir dire, in addressing a newly seated group of potential jurors, the prosecutor stated: "[P]roof beyond a reasonable doubt doesn't require proof to a certainty. [¶] Do you understand that to be the law." Counsel for both defendants objected and asked if they could be heard at the bench. The court responded in the negative and the voir dire continued.

Later that day, the court asked Prospective Juror No. 16 if she had a preconceived notion or agenda about the case and the prospective juror answered in the affirmative. The court asked why the juror thought so. Before she answered, Villegas asked to take up the matter at the bench. The court said, "No." The prospective juror then responded:

"Well, I'm [a] Women's Study major, and I study, like, sociology of women, things such as rape. And I have learned there are thousands and thousands of rapes that go on every year. And the majority of women are too afraid to be able to say something about it. [¶] And so for me —" At that point the court stopped the answer and moved the proceedings to sidebar. The prospective juror then gave a further explanation of her position, and counsel thereafter stipulated to her excusal for cause. Following the excusal, Villegas made a motion for a mistrial based on what had been said in front of the jury panel. The motion was denied.

Yet later during voir dire Prospective Juror No. 18 said that a friend of her daughter's had been attacked by high school boys the past summer. When asked if it was a sexual attack, the prospective juror responded that "[i]t didn't get quite to that point," and further stated that the incident was still under investigation. The prospective juror said she could try to be fair and impartial, but was concerned she could not do so because she would be thinking that the victim might have been her daughter. At sidebar, Torres said the prospective juror had been crying while being questioned. The court disagreed with this assessment. Counsel for both defendants requested a challenge for cause. The court then questioned the prospective juror, who stated that she would not vote for guilt if the evidence did not convince her beyond a reasonable doubt. The challenge for cause was then denied, and the prospective juror was later excused on peremptory challenge. (When the jury panel was accepted, Villegas had not used all of his peremptory challenges.)

Contrary to Villegas's contention, none of these instances provides a basis for reversal of his conviction.

The prosecutor's single reference to "proof to a certainty," which came during voir dire, could not have prejudiced Villegas. With respect to denial of Villegas's motion for mistrial following the voir dire of the Women's Study major, we conduct our review "under the deferential abuse of discretion standard" (*People v. Cox* (2003) 30 Cal.4th 916, 953), further noting that "'"[w]hether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable

discretion in ruling on mistrial motions."' [Citations.]" (*Ibid*.) To be sure, hindsight demonstrates that the trial court would have been well advised to grant Villegas's first request to take up the matter at the bench, but there is nothing in this record to compel the conclusion that the trial court's subsequent denial of Villegas's motion for a mistrial constituted an abuse of discretion. Nor, given Prospective Juror No. 18's answers to the trial court's questions about her ability to serve, did the trial court err in denying Villegas's challenge for cause to that prospective juror. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1199–1200.) Accordingly, Villegas's contention of juror taint must be rejected.

3. Examination of Witnesses

During cross-examination, Villegas asked Daniela M. a series of questions going to the specifics of the sexual attack, including the precise details of the acts of oral copulation and intercourse. In asking about Villegas's initial inability to insert himself for an act of intercourse and Daniela M. opening her mouth for a second act of oral copulation, Villegas asked, "Ms. M., after you sucked him the second time, is that when you for the first time —" At that point the prosecutor objected to "counsel characterizing her volunteering," and the court stated: "Let's be a little bit discrete in terms of this young lady and what she's going through. All right. Frame your questions in a way that are a little more sensitive in what you're doing, Counsel, please. That is an instruction."[1]

When Daniela L. was called to the stand, the court noted that she had requested a Spanish language interpreter. Defendants objected to the use of an interpreter and alternatively asked for a hearing under Evidence Code section 402, arguing that police witnesses had testified their conversations with Daniela L. had been in English and that she had requested the interpreter at trial so she could be evasive on cross-examination.

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[1] In his opening brief, Villegas raises this point as part of the contention, discussed above, that the jury was tainted during voir dire. We nevertheless discuss it here.

Defendants' request for a hearing was denied, and Daniela L. proceeded to testify through an interpreter.

At a sidebar conference during the questioning of Judson Doyle, the lead detective on the case, Villegas sought permission to ask whether in Doyle's conversations with the victims the topic of sex for money ever came up. (At that point, the victims had already testified that it had; Doyle had not mentioned it.) The prosecutor argued that the substance of Doyle's communications with the victims would be hearsay, unless something was being offered as an inconsistent statement. A hearing was then held under Evidence Code section 402, at which Doyle testified that he did not recall the subject being raised. Villegas did not argue the existence of any inconsistencies, and the court denied permission for Villegas to make inquiry in that area.

During cross-examination of Villegas, the prosecutor asked Villegas to review silently a portion of the transcript of a statement he had made to Doyle to refresh his recollection of what he told Doyle. Villegas moved to have the tape recording of the entire statement on which the transcript was based admitted into evidence as a prior inconsistent statement under Evidence Code section 1235. Villegas later added that the tape should be played to show that he was sober. The prosecutor argued that the tape did not allow a conclusion regarding whether Villegas was intoxicated. The court, after noting that the tape was hearsay, found that it had no probative value on this subject. The court added that even if the tape had probative value, playing it would unduly consume a great amount of time and that the tape should therefore be excluded under Evidence Code section 352.

Again, Villegas's contentions are of no avail. Villegas could not have been prejudiced by the trial court's admonition for counsel to be more discrete and sensitive in questioning Daniela M. about sex acts. Nor does the record indicate the existence of a valid basis for challenging Daniela L.'s use of an interpreter or demonstrate that the trial court abused its discretion in acceding to Daniela L.'s request to so testify. Finally, Villegas has not established an abuse of the trial court's discretion in refusing permission to ask Detective Doyle about what was *not* said by the victims when they were being

interviewed or to permit the tape recording of Villegas's statement to Doyle to be played for the jury. In both instances, Villegas never identified any purportedly inconsistent statements and, with respect to the tape, has not shown that the trial court abused its discretion under Evidence Code section 352 by denying the request to play it. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

4. Evidentiary Issues

During direct examination, Detective Doyle was asked for the time at which the 911 call was placed by the neighbor who heard Daniela L.'s screams. Defense counsel interposed a hearsay objection. The court said that Doyle could attempt to lay a foundation for that evidence at a hearing under Evidence Code section 402. At the hearing, Doyle testified that when 911 calls are made, information about the call, including the time the call was made, is entered into a database. Doyle continued that he had made a printout of the information from the database and that he had received training in the procedure for transmitting 911 information. The court found that a foundation had been established under the business records exception to the hearsay rule and permitted Doyle to testify about the time that the 911 call was made.

When the prosecutor moved to admit exhibits used at trial into evidence, Villegas objected on hearsay grounds to diagrams that a nurse practitioner who examined Daniela M. in the hospital had used in testifying regarding the scratch marks on Daniela M.'s body and the genital trauma Daniela M. had suffered. The court, analogizing the exhibits to photographs, overruled Villegas's objection.

Neither of these hearsay rulings constituted error. Evidence Code section 1271 provides an exception to the hearsay rule for writings where, as here, a foundation has been laid that the writing was made in the regular course of business, at or near the time of the event, the witness testifies as to its identity and its mode of preparation, and the sources of information indicate its trustworthiness. The trial court aptly analogized the diagrams to photographs, and in any event Villegas failed to object to use of the diagrams during the nurse practitioner's trial testimony in the People's case-in-chief. Finally, even

assuming error in admitting the diagrams and evidence of the 911 call, such error was manifestly harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

5. Prosecutorial Misconduct

While testifying at trial, Daniela M. was not able to identify defendants in the courtroom. In a meeting later that day with the prosecutor in his office to discuss the remainder of Daniela M.'s testimony, Daniela M. saw a photograph on the prosecutor's desk that depicted Torres as he appeared on the night in question, and recognized him. She also saw a photograph of Villegas on the prosecutor's desk and identified him as the man who had raped her. When her testimony resumed, she identified defendants in court, noting that she had seen photographs on the prosecutor's desk. (In rebuttal argument to the jury, the prosecutor stated that defendants looked different at trial than when they were arrested and that he had placed the photographs on his desk to see if Daniela M. would notice them. The prosecutor also emphasized that identity was not an issue in this case.)

Deputy Jonathan Cooper was one of the officers who first responded to the scene. In testimony after Cooper had been recalled as a witness, Cooper said that when he initially saw Villegas, Villegas said that he had been laying on the grass with his girlfriend. Cooper continued that he next asked Daniela M. if she knew Villegas, and Daniela M. said that she did not. The prosecutor then asked, "Now, you gave Mr. Villegas a chance to explain what went on that night, didn't you?" Cooper answered in the affirmative, whereupon the prosecutor asked to approach the bench before he asked the next question.

At the bench conference, the prosecutor stated that he had a right to ask the question because Villegas's "counsel had already asked him about what his client said to [Deputy Cooper] and didn't say to him." Villegas's counsel responded, "I don't believe counsel can characterize. He can say what did the deputy say. He can ask him what my client said. Characterizing it is absolutely immaterial." The court agreed that the question had an "editorial aspect" and instructed the prosecutor to "ask [Cooper] simply,

did [Villegas] explain further — anything further about what he was doing other than what he said." When proceedings resumed before the jury, the following ensued:

"[The Prosecutor]: Deputy, you attempted to talk to defendant Villegas, didn't you? [¶] [Cooper:] Yes, Sir. [¶] [The Prosecutor:] Did he tell you — did he take advantage of that opportunity to tell you what happened? [¶] [Defense Counsel]: Excuse me. Objection to the form of the question. [¶] The Court: Yes. Restate. [¶] [The Prosecutor]: Did he tell you anything about what happened that night? [¶] [Cooper:] No, Sir."

On the morning trial was to start, the prosecutor noted that Daniela M. had not yet arrived and requested that a bench warrant or a body attachment be issued and released. The court stated it would do so, and the topic of Daniela M.'s presence was not again mentioned. During closing argument, the prosecutor stated that making accusations such as those to which Daniela M. testified "is not something somebody would voluntarily do. But Daniela M. did that for you so that you could hear what happened to her."

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

"'As a general rule a defendant may not complaint on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]' [Citation.] [¶] The foregoing, however, is only the general rule. A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if '"an admonition

would not have cured the harm caused by the misconduct."' [Citations.]" (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.)

There is nothing in the instances that Villegas has cited that involves a deceptive or reprehensible method of attempting to persuade the jury, nor do these instances involve anything that could have prejudiced Villegas. Accordingly, his contention of prosecutorial misconduct must be rejected.

6. Inconsistent Verdicts

Villegas contends that the verdict acquitting him of the charged offense of kidnapping to commit rape is inconsistent with the One Strike findings accompanying the rape and forcible oral copulation verdicts that the victim of these crimes had been subjected to a simple kidnapping and that the kidnapping substantially increased the risk of harm to her. Villegas further argues that because of the inconsistency, the One Strike findings must be reversed. We disagree.

The verdicts are not necessarily inconsistent. As noted by the prosecutor below, the most likely explanation for these verdicts and findings is that the jury was not convinced beyond a reasonable doubt that, when defendants first picked up the victims from the bus stop, Villegas entertained the specific intent to commit a sexual assault. Rather, defendants' intent to engage in such conduct was conclusively proved only when defendants failed to take the girls where they wanted to go, and the risk of harm increased when the car was stopped in a secluded area where the sex crimes occurred. Under such a scenario, the verdicts would not be inconsistent. (See *People v. Panah* (2005) 35 Cal.4th 395, 489–490.) But even if the verdicts were inconsistent, "'[i]t is . . . settled that an inherently inconsistent verdict is allowed to stand . . . .'" (*Id*. at p. 490.) Accordingly, Villegas's contention must be rejected.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

We concur:

ROTHSCHILD, J.

JACKSON, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.